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JURISDICTION OVER DEBTS FOR THE PURPOSE OF ADMINISTRATION, GARNISHMENT, AND TAXATION

WHILE physical power is recognized as the foundation of jurisdiction,[1] and many important rules of law are based on this principle as, for example, the rules that service by publication does not warrant a personal judgment against a nonresident,[2] and power of control over the *res* constitutes sufficient basis for jurisdiction *in rem*,[3] and without such control of the *res*, a judgment *in rem* is not valid,[4] still this fundamental principle has not always been kept clearly in mind, and the failure to do so has produced a complex and confused state of the law where simplicity only need exist. This is especially true of the law as respects jurisdiction over debts. Control over the *res* will give jurisdiction *in rem*, though its owner is an absent nonresident and not served personally with process. Thus jurisdiction *in rem* is exercised

[1] In McDonald *v.* Mabee, 243 U. S. 90, 91 (1917), where it is held a personal judgment rendered upon service by publication is void, Holmes, J., says: "The foundation of jurisdiction is physical power, although in civilized times it is not necessary to maintain that power throughout proceedings properly begun, and although submission to the jurisdiction by appearance may take the place of service upon the person. . . . No doubt there may be some extension of the means of acquiring jurisdiction beyond service or appearance, but the foundation should be borne in mind."

[2] Pennoyer *v.* Neff, 95 U. S. 714 (1877); McDonald *v.* Mabee, 243 U. S. 90 (1917).

[3] 27 HARV. L. REV. 107.

[4] The Belgenland, 114 U. S. 355 (1885), 27 HARV. L. REV. 107; Pennoyer *v.* Neff, 95 U. S. 714 (1877); Union Refrigerator Transit Co. *v.* Kentucky, 199 U. S. 194 (1905).

by admiralty courts over vessels,[5] and by equity courts, through the aid of statutes, over land[6] situated within the boundary of their sovereign without regard to jurisdiction over the persons having interests therein. In other words, where the state has power of control over the *res*, it has not only the power which every state unrestricted by constitutional inhibitions has to destroy the rights, powers, and immunities as respects that *res* of an owner over whose person it has no jurisdiction, but such power, when exercised in accordance with the accepted principles of jurisdiction *in rem*, is respected in other states on common-law principles, and is not objectionable as violating any constitutional guaranty of the owner.[7] While power of control is the foundation upon which jurisdiction rests, it is not incumbent upon courts to take jurisdiction in every instance where such power exists. Policy or restrictions of the federal constitution may stand in the way. Thus, for practical reasons, ancillary administration would not be granted in a state where property of the decedent was merely in transit through that state, though such state would have power to grant such administration. Or it may be that due process of law requires the courts of a state where property is located to refuse jurisdiction unless there has been notice by publication to the absent non-resident owner.[8] Or it may be that the requirement of due process of law would not be met by a state levying a tax upon property merely in transit through the state, though the state would have power to levy such tax except for the constitutional prohibition.[9]

Jurisdiction over tangible property is dependent upon the physical presence of the property, for it is at such place that the power of control exists. But the important thing to observe is, that it is the power of control that is the basis of jurisdiction, and not location, and it is this power of control which gives whatever significance there is to the legal concept, "situs."[10]

[5] The Belgenland, 114 U. S. 355 (1885).

[6] Arndt *v.* Griggs, 134 U. S. 316 (1890).

[7] Pennoyer *v.* Neff, 95 U. S. 714 (1877); Arndt *v.* Griggs, 134 U. S. 316 (1890).

[8] Arndt *v.* Griggs, 134 U. S. 316 (1890).

[9] Hays *v.* Pacific Mail S. S. Co., 17 How. (U. S.) 596 (1854); Qld Dominion Steamship Co. *v.* Virginia, 198 U. S. 299 (1905).

[10] Situs is said to be the basis of jurisdiction over property. When referring to tangible property, the word is used to designate the place where it is located. To use "situs" in respect to tangible property as meaning anything else than actual location, as for example the place where the property will be considered as having its

It is evident that the law for purposes of jurisdiction is not interested in the spatial quality of property, that is, the fact that the property has extension, or occupies space, except in so far as that quality affords the state the power of control over it. If the location, or situs, of tangible property gave no power of control, or if control could be exercised independently of situs, then we should never have "situs" mentioned in connection with jurisdiction over property. Where the property is tangible in form, power of control, and location coincide.[11]

Even here it is evident that it is power of control and not location that is the basis of jurisdiction. For the mere fact that the property is within the territory during the litigation is not enough; control must be taken at the time litigation is begun.[12]

Where the property is intangible, however, this element of location is absent, but power of control may still exist and constitute the basis of jurisdiction. The failure to observe that it is this element of control, and not the quality of occupying space, that gives "situs" its significance, has led to the greatest confusion in the decisions relating to jurisdiction over intangible property in the form of debts. A variety of views, mostly untenable, has developed as a result of the attempt to use "situs" in the sense of location as applicable to debts. One view locates it, by means of the fiction *mobilia sequuntur personam*, at the creditor's domicil;[13] another at the debtor's domicil;[14] a third, considering it a light and nimble thing, finds that it may be located by legislative fiat at the debtor's domicil;[15] a fourth considers a debt, since it is intangible, as being without situs;[16] a fifth, as having its situs determined in each case by the purpose involved;[17] a sixth, that it has

situs for legal purposes, when such place differs from its actual location, is to introduce fiction without any justifiable excuse. This only serves to conceal truth and lead to confusion. Hays *v.* Pacific Mail Steamship Co., 17 How. (U. S.) 596 (1854), is an example of a case where "situs" is used in a fictional sense, and there is exhibited an insufficient grasp of the principles of jurisdiction.

[11] Pennoyer *v.* Neff, 95 U. S. 714 (1877).

[12] Pennoyer *v.* Neff, 95 U. S. 714 (1877).

[13] State Tax on Foreign-Held Bonds, 15 Wall. (U. S.) 300 (1872).

[14] Bragg *v.* Gaynor, 85 Wis. 488, 55 N. W. 919 (1893).

[15] MINOR, CONFLICT OF LAWS, 287.

[16] "The true view would seem to be that a chose-in-action, not being corporeal has no situs for any purpose." BEALE, CASES ON CONFLICT OF LAWS, Vol. III, 507, § 25.

[17] 16 HARV. L. REV. 63, note.

two situses, an actual one at the domicil of the debtor, and a legal one at the domicil of the creditor;[18] a seventh, that where the debt is in the form of a bond, note, or other specialty, its situs is where the instrument is;[19] and an eighth, which seems to be the more accurate view, that the situs of a debt is wherever the debtor can be found.[20]

Bearing in mind this elemental fact that physical power is essential to jurisdiction over property and considering situs as the place where power of control can be exercised, let us in the light of the jurisdiction that is exercised over tangible property, consider the problems of jurisdiction over debts for the purpose of administration, garnishment, and taxation.

I. Jurisdiction over Debts for Purposes of Administration

A debtor may be sued wherever process may be served upon him. This fact justifies the decisions which allow an administrator to sue a foreign debtor who comes within the jurisdiction in which the administrator is permitted to sue. Power to collect the debt exists there, as there is power of control over the debtor. If an administrator wishes to recover property or debts outside the state, he must be granted ancillary administrative power.[21]

Ancillary administration will be granted by the courts of a state where the tangible property of a nonresident decedent is located. Power of control over the property both demands and justifies this procedure.

In like manner ancillary administration will be granted by the courts of a state where a debtor of a nonresident decedent is domiciled. Power of control over the debtor is required to give the necessary power of control over the debt.

As no administration would be granted by the courts of a state through which a chattel is in transit, so no administration will be granted where a debtor is present within the state only temporarily. The reason for the refusal to take jurisdiction in such cases is not that there is a lack of power to exercise jurisdiction, but for the

[18] Minor, Conflict of Laws, § 121.

[19] Bacon *v.* Hooker, 177 Mass. 335, 337, 58 N. E. 1078 (1901).

[20] Harris *v.* Balk, 198 U. S. 215 (1905).

[21] Unless a state expressly grants that power to a foreign executor or administrator by statute as is done in some states. See Rev. Stat. of Ill. 1915–16, chap. 3, § 42.

practical reason that the administrator cannot be sure of reducing his claim to possession in that state.[22] Where the property is permanently located or where the debtor has his domicil, there the court has jurisdiction all the time, and if administration is granted, the administrator can be practically certain of making use of the powers granted him.

II. Jurisdiction over Debts for Purposes of Garnishment

We have seen that power of control over the debtor is the foundation of jurisdiction over debts for purposes of administration. As tangible property must have a more or less permanent situs for purposes of administration, so in case of a debt sufficiently permanent situs is found where the debtor is domiciled. It is at such place that power of control of a necessary duration exists.

Tangible property may be attached in any state where it lies.[23] So the possessor of a chattel may be garnisheed in any state where he holds the chattel. This is true though the goods happen to be merely in transit through the state.[24] If the goods have not come into the state, or have passed through, the possessor is not subject to garnishment.[25] The temporary physical presence of the tangible chattel affords the state power of control over it of a duration sufficient for the purpose of garnishment, and as jurisdiction over the debtor affords the state a similar power of control over the debt, on principle we should expect to find in that case also temporary jurisdiction over the debtor sufficient for garnishment proceedings. And so we do actually find it. It has been so held in a series of comparatively recent cases by the United States Supreme Court.[26] Jurisdiction in these cases has been placed upon the ground that

[22] 27 Harv. L. Rev. 114, 115; Saunders *v.* Weston, 74 Me. 85 (1882); Pinney *v.* McGregory, 102 Mass. 186 (1869); Stearns *v.* Wright, 51 N. H. 600 (1872); Fox *v.* Carr, 16 Hun (N. Y.), 434 (1879); Barrett *v.* Barrett, 170 Ky. 91, 185 S. W. 499 (1916).

[23] Bowen *v.* Pope, 125 Ill. 28, 17 N. E. 64 (1888); King *v.* Vance, 46 Ind. 246 (1874); Melhop *v.* Doane, 31 Iowa, 397 (1871); Downer *v.* Shaw, 22 N. H. 277 (1851).

[24] 27 Harv. L. Rev. 107, 113.

[25] Western R. R. Co. *v.* Thornton, 60 Ga. 300 (1878); Montrose Pickle Co. *v.* Dodson, etc. Mfg. Co., 76 Iowa, 172, 40 N. W. 705 (1888); Sutherland *v.* Second National Bank, 78 Ky. 250 (1880); Pennsylvania R. R. Co. *v.* Pennock, 51 Pa. 244 (1865); Bates *v.* Chicago, M. & St. P. Ry. Co., 60 Wis. 296, 19 N. W. 72 (1884). These cases, with others, are cited in 27 Harv. L. Rev. 113.

[26] Chicago, R. I. & P. Ry. Co. *v.* Sturm, 174 U. S. 710 (1899); Harris *v.* Balk, 198 U. S. 215 (1905); Louisville & Nashville R. R. Co. *v.* Deer, 200 U. S. 176 (1906).

"power over the person of the garnishee, confers jurisdiction on the courts of the State where the writ issues."[27]

While these decisions of the United States Supreme Court, holding that a judgment obtained in a court having jurisdiction over the person of the garnishee only, are good against the defendant, a nonresident debtor-creditor, upon whom service was not obtained, and are entitled to full faith and credit in the other states of the Union, these holdings do not require the courts of the state in which garnishment proceedings against a nonresident defendant are originally brought to take jurisdiction. They have nevertheless settled the law in favor of taking jurisdiction in such cases. Where statutes authorize such proceedings, there is no reason for the courts adopting a hostile attitude and interpreting them as not intending such operation, or refusing to take jurisdiction in such case.[28]

Though the law is settled in harmony with the doctrine of *Harris* v. *Balk*, strong objections have been urged against it by Professor Joseph H. Beale, one of America's ablest writers on the Conflict of Laws.[29] These objections must now be examined. There are several of them. One, that it is a departure from the custom of London as to Foreign Attachment upon which our statutory process of foreign attachment or garnishment is based; another, that it loses sight of the original conception of garnishment as a proceeding *in rem*, and substitutes for it the conception of garnishment as a transitory personal action against the garnishee; another, that a debtor cannot be discharged of his debts to foreign creditors in a garnishment proceeding since he cannot in an insolvency proceeding; and other objections are, that it is unjust both to the garnishee and to the principal defendant.[30]

Undoubtedly our practice in garnishment proceedings has gone beyond the custom of London as to Foreign Attachment in that our law does not require the garnishee to be a resident of, or the debt payable in the jurisdiction where the proceeding is begun, as does the custom of London. The custom does, however, have this

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[27] Harris *v.* Balk, 198 U. S. 215, 222 (1905).

[28] See cases collected in 19 L. R. A. 577; 67 L. R. A. 209; 3 L. R. A. (N. S.) 608; 20 L. R. A. (N. S.) 264; 1915F L. R. A. 880.

[29] 27 HARV. L. REV. 107–44.

[30] *Ibid.*, 107, 115, 116, 120–22.

fundamental likeness to our practice; it permits debts due the nonresident defendant to be appropriated to the payment of debts due the plaintiff without personal service upon the defendant.[31]

But surely it is not seriously contended that our practice as to garnishment is unwarranted because our legislatures have had the temerity to depart from the custom of London as it existed perhaps three centuries ago, and it cannot be concluded that these statutes have departed from the custom without observing the end such departure sought to accomplish, — the application of valuable assets of the debtor, which could not otherwise be reached, to the payment of his debts. It is very likely these statutes were framed with the deliberate purpose of covering debts wherever payable, and of catching the garnishee whether a resident or not. Professor Beale nowhere urges that the custom of London goes too far. In fact, he urges that the fault in our practice lies in its departure from the custom, but his contention stated later herein, that the court of the debtor's domicil has no power to reach the debt due the foreign debtor-creditor without jurisdiction over his person, would, had it been heeded, have prevented the custom from ever arising. There never could have been garnishment of debts in such case without personal service upon the defendant, the foreign debtor-creditor.

Furthermore, Professor Beale's assertion that to allow an action against the garnishee wherever found, involves an abandonment of the idea of the action as one *in rem*, and a treatment of it as a transitory personal action against the garnishee, is based upon the assumption that the debt cannot have a situs with the debtor. If the situs of the debt is wherever you can get service upon the debtor (garnishee), because that is where you can exercise control over the debt, then there exists in that place the basis for jurisdiction *in rem*. Professor Beale admits, as every thoughtful lawyer must admit, that power of control over the debt gives jurisdiction, and jurisdiction *in rem*, too, but he would say you get no power

[31] "Under these proceedings (custom of London) without personal service upon the defendant, debts due the defendant, which were not subjects that could be reached by a *fi. fa.* at law, were subject to his (plaintiff's) claim." Haber *v.* Nassits, 12 Fla. 589, 609 (1869).

Our proceedings by attachment against absent and absconding debtors are borrowed from what is called a foreign attachment under the custom of London. Welsh *v.* Blackwell, 14 N. J. L. (2 Green) 344, 346 (1834).

of control over the debt by having jurisdiction over the debtor alone. He says:

"The true doctrine would seem to be that a debt has in fact no situs anywhere; not merely because it is intangible but because as a mere forced relation between the parties it has no real existence anywhere. Like other such relations it may, of course, be controlled by the law, or by the courts as instruments of the law; but the control must be obtained by making use of the relation. In order to control the relation the court must have the power to control both parties to it. Any court which has both debtor and creditor may compel a release from the creditor, and an assignment of the action of the creditor. In other words, if a debt is to be legally assigned or discharged it requires the action of both parties, and especially the creditor, and the court which has to apply such a process must do so through its control over both parties."[32]

We agree in part with Professor Beale in this statement; we admit that a debt has no existence anywhere, that it consists of a relation between debtor and creditor, and that this relation is subject to control by the courts. But we take issue with him as to the place where the courts may exercise that control for purposes of garnishment. Ownership of tangible property consists of a relationship[33] perhaps somewhat different from the relationship between creditor and debtor, because of the difference in the elements related. In the case of tangible property, the direct relationship between the owner and the thing is without significance because the *res* has no rights, powers, privileges, or immunities which it may exercise against the owner or any will to assert them. The relationship is of importance only as it affects some third person or persons. In the case of a debt, the relationship between the creditor and debtor has two aspects of significance for the law; one, the direct relationship between the creditor and the debtor, *i. e.*, the right *in personam* which the creditor has against the debtor, and the correlative duty of the debtor to the creditor, and the other, its relationship to third persons, *i. e.*, to the world. In this latter aspect, the law has come to treat this right of the creditor as it relates to third persons as a property right. The debt is an asset of the creditor, in the same way in which any tangible property he owns is an asset.

In garnishment proceedings we are dealing with the rights of

[32] 27 HARV. L. REV. 107, 115–16.

[33] AMES, LECTURE ON LEGAL HISTORY, 212.

a third person to treat the debt due a creditor as assets, and to apply it as he would assets of a tangible sort to the payment of debts due him. In garnishment proceedings it is submitted that the doctrine of our courts is sound in considering jurisdiction over the debtor (garnishee) alone as sufficient basis of jurisdiction *in rem* over the debt. The analogy of the attachment and garnishment of chattels warrants this conclusion.

We have seen that tangible property may be attached in any state where it lies, and that the possessor of a chattel may be garnisheed in any state, regardless of the fact that the owner resides outside the state, and is not served with process. Here is a basis for jurisdiction *in rem*, or rather *quasi in rem*, and the courts have found no difficulty in severing the relationship of the owner to the property, without having the owner before it, and such decisions have been held not to violate any constitutional guaranty.[34]

Jurisdiction over the debtor gives as complete control over the debt as the physical presence of a piece of tangible property gives the court power of control over it. The court, having exclusive jurisdiction over the debtor, has power to appropriate the debt in the same way that a court having jurisdiction over tangible chattels may appropriate them to the payment of the debtor's debts. In either case the restrictions on the court's power to do as it pleases with the chattel or debt do not arise from a lack of control, but are imposed by the constitution or out of considerations of policy.

Professor Beale contends that since a debtor cannot be discharged of debts which he owes to foreign creditors in an insolvency proceeding had at his domicil, a debtor cannot have a debt which he owes to a foreign creditor made the subject matter of a garnishment proceeding. But this is a *non sequitur* for two reasons. First, the two proceedings are not alike in all particulars, and secondly, if they were, it does not necessarily follow that garnishment should be treated as insolvency is treated rather than the reverse.

While the power of control over the debtor is the same in each proceeding, they differ so far in other particulars that it may be argued they should be treated differently. In the case of a discharge in insolvency we deal directly with the *contract right* between

[34] Cooper *v.* Reynolds, 10 Wall. (U. S.) 308 (1870), approved in Pennoyer *v.* Neff, *supra*. Statutes authorizing attachment of the goods of a foreign owner on notice by publication, exist in most of the states, and their validity has not been questioned.

the debtor and creditor, and not as a piece of property or assets of the creditor, which a third person comes against, while in attachment or garnishment of a debt, we are treating the creditor's right as a piece of property the same as tangible property, and are seeking to apply it to the payment of the debtor's debts to a third person. There may be warrant for establishing a rule of law, as is done in attachment and garnishment cases, which seeks to prevent debtors with property from escaping the payment of just debts, that could not be urged for a rule of law, as is the case in insolvency proceedings, that aided a debtor in embarrassed circumstances to escape the payment of his debt to a creditor. A state insolvency law discharging debts owing to foreign creditors might be regarded as unconstitutional on the ground of an "implied restriction on the power to pass insolvent laws reserved to the States (*Denny* v. *Bennett*, 128 U. S. 489, 498), possibly on the ground that the discharge would impair the obligation of contracts with persons not within the jurisdiction (*Cook* v. *Moffat*, 5 How. (U. S.) 295, 308); possibly by reason of the Fourteenth Amendment (*Pennoyer* v. *Neff*, 95 U. S. 714), possibly upon some vaguer ground."[35] But to take the view of the earlier United States Supreme Court cases, that a contract made and to be performed in the state of the debtor's domicil could not be discharged in an insolvency proceeding by the courts of that state as against a foreign creditor on the ground that "when . . . the States pass beyond their own limits, and the rights of their own citizens and act upon the rights of citizens of other States, there arises a conflict of sovereign power, and a collision with the judicial powers granted to the United States, which renders the exercise of such a power incompatible with the rights of other States, and with the Constitution of the United States,"[36] would make all jurisdiction *in rem* unconstitutional. It would make statutes authorizing attachment or garnishment of chattels within a state for the purpose of applying them to the payment of a foreign debtor's debt, as well as the doctrine of *Harris* v. *Balk*, unconstitutional. For in jurisdiction *in rem* and *quasi in rem*, states pass beyond their own limits and determine the rights of citizens of other states.

[35] Quoted from Phoenix National Bank *v.* Batcheller, 151 Mass. 589, 592, 24 N. E. 917, 918 (1890).

[36] This was the ground of decision in Ogden *v.* Saunders, 12 Wheat. (U. S.) 213, 218 (1827), as sanctioned and stated in Baldwin *v.* Hale, 1 Wall. (U. S.) 223, 231 (1863).

Furthermore, even if it were admitted that insolvency and garnishment proceedings are wholly analogous, there would seem to be at least as much basis for urging that insolvency proceedings should affect the rights of the absent nonresident creditor as proceedings in garnishment do, as for urging the reverse. Consideration of the relative antiquity of the two doctrines[37] and of power of control over the debtor as giving control over the debt as the determining factors sanction this view. It will be observed, too, in this connection that under the English law a discharge of a debt in insolvency or bankruptcy proceedings had at the debtor's domicil, where that is the place of contracting and performing, will operate as a discharge everywhere, and that this English rule was early followed in this country[38] and departed from out of deference to the opinion of the United States Supreme Court upon the ground that a judgment by a state court holding that a discharge of a debt in insolvency proceedings within the state would bar an action by a foreign creditor, would be reviewable by the United States Supreme Court on the ground that it violated some constitutional guaranty of the creditor.[39] Westlake suggests that a discharge in bankruptcy, in the bankrupt's state, would, if we had a perfect cosmopolitan system of bankruptcy, bar suits in other states.[40] It would seem to be proper and even desirable that a discharge in insolvency in the state of the debtor's domicil should operate as a discharge of all his debts, including those owing to foreign creditors, where the creditors were properly safeguarded and given ample opportunity to file their claims and to secure their allowance and *pro rata* payment.

Professor Beale's argument that it is unjust to the garnishee debtor because he cannot be protected from suit by the defendant in a foreign jurisdiction applies with equal force to the case of a garnishee in possession of a chattel, in which case Professor Beale says, "there is no difficulty whatever and no difference of opinion

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[37] As we have seen, our practice as to foreign attachment is based upon the custom of London which dates back perhaps three centuries, whereas the leading case holding in accord with our present doctrine as to insolvency was not decided until less than a century ago. That is the case of Ogden *v.* Saunders, 12 Wheat. (U. S.) 132, 218, decided in 1827.

[38] Scribner *v.* Fisher, 2 Gray (Mass.), 43 (1854); Felch *v.* Bugbee, 48 Me. 9 (1859).

[39] Phoenix National Bank *v.* Batcheller, 151 Mass. 589, 24 N. E. 917 (1890).

[40] PRIVATE INTERNATIONAL LAW (2 ed.), § 224 (1880).

in the cases."[41] Of course, the argument can have no weight in the United States, where the garnishee is protected by the full-faith-and-credit clause of the federal constitution.

The interesting case of *Ward* v. *Boyce*,[42] which Professor Beale cites to show that even the United States Supreme Court could not protect the garnishee against the obligation to pay the debt again, is not peculiar to the garnishment of debts. A comparison of the facts of that case with a parallel situation in the case of the garnishment of chattels will make it evident that there is no injustice in that decision peculiar to our practice of garnishment of debts. In *Ward* v. *Boyce*, the defendant (garnishee) by trustee process was made to pay to the plaintiff, in Vermont, a debt which a Vermont court found he owed to an absent husband, and he was not protected against a suit by the wife of the absent husband, who proved to the satisfaction of a New York court that the defendant owed her instead of her husband. If instead of owing a debt to the wife, the defendant had held possession of a chattel of hers in Vermont, and had allowed it to be taken and applied in payment of the husband's debts upon the supposition that it was the husband's property, will it be contended that he will be protected by reason of the Vermont proceeding from a suit by the wife in New York? Frankly it is impossible to see how the doctrine of *Harris* v. *Balk* will cause greater injustice to the debtor who is garnisheed than the admittedly proper doctrine of the garnishment of chattels will cause to the garnished possessor of chattels.

Professor Beale presents forcibly the argument that the garnishment process subjects the nonresident principal defendant to fraudulent and doubtful claims without redress. He says:

"An owner of property may determine the situs of the property he owns, and may justly be subjected to the action of the courts within whose territory his property is found. The creditor, however, has no power to fix the personal presence of his debtor at one place or another. For all the creditor can do, the debtor may travel where he will. It is therefore unjust to submit the creditor's claim to the accident of the debtor's presence in one state or another. Yet, according to the current doctrine, if the debtor is traveling a thousand miles away from the creditor's domicil, he may there be garnished and be compelled to pay a claim

[41] HARV. L. REV. 107, 113.

[42] 152 N. Y. 191, (1897), cited in 27 HARV. L. REV. 107, 121.

which is alleged to be a legal claim against the creditor. To be sure if the creditor happens to have notice of the suit, which can usually be obtained only by careful reading of the newspaper published where the suit is brought, he has a right to defend himself; but unless the claim as made in the garnishment proceeding is a very large one it will hardly pay him to travel across the country in order to meet the charge, taking with him his evidence. Without doing so, his effort to disprove the claim, however groundless it may be, is practically hopeless; the absentee is always wrong, just as surely in court as in the outside world. He may send on his deposition but a deposition is of very little force against the actual living testimony of the plaintiff. He may employ counsel, but counsel is helpless without witness. Garnishment, therefore, is practised at the present day as a safe and easy instrument of fraud."[43]

It must be borne in mind that Professor Beale admits that the practice of attachment and garnishment of tangible chattels, wherever found, though the owner is absent and a nonresident, is sound and proper.[44] The only difference between attachment and garnishment of a tangible chattel and of a debt, as respects any injustice that may be done the owner or creditor, is that in the case of a tangible chattel the owner has more power to fix its situs than the creditor has to fix the personal presence of the debtor. So far as the defendant's chances of getting notice of suit being brought are concerned they are even greater in the case of the garnishment of a debt than in the case of the attachment of a tangible chattel, for the doctrine of *Harris* v. *Balk* requires the garnishee to give his creditor notice if he is to avail himself of the judgment and payment thereunder, whereas no such requirement is made in a case of the attachment of tangible property. Professor Beale's statement that the creditor can usually get notice of the suit "only by careful reading of the newspaper published where the suit is brought," is, therefore, inaccurate. So far as the hopelessness of disproving a wholly fraudulent claim the case of attachment and garnishment of tangible chattels and of debts are on a par. And so far as the writer has been able to ascertain the actual instances of fraud and trumped up claims that have crept into garnishment proceedings because of the fact that the debtor may move about

[43] 27 HARV. L. REV. 107, 121–22.

[44] In 27 HARV. L. REV. 107, 113, he says: "In the case of a tangible chattel there is no difficulty whatever and no difference of opinion in the cases."

freely without the creditor's being able to fix his presence are rare. It is believed that Professor Beale's statement, though skilful, is exaggerated. Further, his statement does not touch the soundness of the principle that the court which gets jurisdiction over the debtor has jurisdiction to apply the debt the garnishee owes the absent defendant in satisfaction of the plaintiff's claim. Whether it is advisable to have statutes authorizing the proceeding is purely a matter of policy. Whether it is better policy to permit absent and absconding debtors to escape the payment of just debts than to subject the debtors to the possibility (which experience has shown to be slight) of trumped up and fraudulent claims, is entirely a question of legislative policy. The fact that the proceeding of garnishment against foreign debtors has been so generally established in this country, would indicate which is considered the better policy.

III. Jurisdiction over Debts for the Purpose of Taxation

As power of control over tangible property and over the debtor was seen to be the foundation of jurisdiction over such property and debts for purpose of administration, so power of control over tangible property and over the debtor is seen to be the foundation of jurisdiction over such property and debts for the purpose of attachment and garnishment. As a more or less permanent situs of tangible property is required for purpose of administration over the property, so domicil of the debtor (a thing of a more than temporary character) is required for purpose of administration over the debt. But as a temporary situs is sufficient for attachment and garnishment of tangible property, so the temporary presence of the debtor is sufficient for the garnishment of debts.

For the purpose of taxation in respect to tangible property we find power of control is likewise essential to give jurisdiction, because in the American states the theory prevails that the right of the state to exact a tax rests upon the existence of a protection, service or benefit rendered as an equivalent for the tax exacted, and though the state where the owner resides has control over his person, yet protection, service, or benefit to him in respect to his property can only be rendered by the state which has that power of control over the property. Where such power of control

is absent and therefore where the state has not given such protection, the exaction of a tax is unconstitutional on the ground that it is taking property without due process of law.[45]

Since power of control over the property is what makes possible protection to the property, and since protection, potentially at least, is rendered wherever such power of control exists, we should expect on principle to find the courts supporting any tax imposed by a state having power of control over the property, unless the property was in the state so short a time that the protection rendered would make the taking of a tax arbitrary or confiscatory under our Constitution. Temporary presence is not enough;[46] mere transit through the state will not warrant the imposition of a tax. We find that a property tax may be levied upon real property, both tangible and intangible, and upon tangible personal property, by the state where it is permanently located. That is the state that has power of control over the property,[47] and such state is the only one that can tax it. A tax imposed by the state of the owner's domicil in which the property is not located is taking property without due process of law.[48]

Protection or benefit given is also the principle that is sought to be applied in the succession tax. A succession tax by the state where the property is located is universally upheld. This is true

[45] Union Refrigerator Transit Co. *v.* Kentucky, 199 U. S. 194, 202 (1905). In that case it was said: "The power of taxation, indispensable to the existence of every civilized government, is exercised upon the assumption of an equivalent rendered to the taxpayer in the protection of his person and property, or in the creation and maintenance of public convenience in which he shares, such, for instance, as roads, bridges, sidewalks, pavements and schools for the education of his children. If the taxing power be in no position to render these services, or otherwise to benefit the person or property taxed, and such property be wholly within the taxing power of another State, to which it may be said to owe an allegiance and to which it looks for protection, the taxation of such property within the domicil of the owner partakes rather of the nature of an exaction than a tax, and has been repeatedly held by the court to be beyond the power of the legislature and a taking of property without due process of law."

[46] Hays *v.* Pacific Mail S. S. Co., 17 How. (U. S.) 596 (1854); Old Dominion Steamship Co. *v.* Virginia, 198 U. S. 299 (1905).

[47] Illinois Central Ry. Co. *v.* Greene, 244 U. S. 555 (1917); Delaware, etc. R. R. Co. *v.* Pennsylvania, 198 U. S. 341 (1905); Union Transit Co. *v.* Kentucky, 199 U. S. 194 (1905); *In re* Estate of Swift, 137 N. Y. 77, 32 N. E. 1096 (1893). See cases collected in 1 WHARTON (3 ed.), 165; XII AMERICAN LAW AND PROCEDURE, § 173.

[48] Delaware, etc. R. R. Co. *v.* Pennsylvania, 198 U. S. 341 (1905); Union Refrigerator Transit Co. *v.* Kentucky, 199 U. S. 195 (1905).

whether it is the transmission of real or personal property that is taxed.[49] A tax at such place no matter which of the existing views we may take of the succession tax, whether we consider it a tax upon the property itself, or upon the privilege of transmitting it, or of acquiring it, or upon the transfer of it, seems sound. It accords with the principle of a protection, benefit, or privilege given as an equivalent for the tax. For the state where the property is located in its ultimate analysis, is the state which has the power of control over and gives force to the privilege to transmit or acquire and makes effective the transfer.

Of course, if the tax were levied upon the privilege of receiving possession and of enjoying the property of its equivalent, or receiving and enjoying the income thereof, the state of the distributee's domicil would be the one having power of control and the one making effective the privilege, and should therefore be the one to levy such tax.[50]

But it is also held that a succession tax may be levied at the domicil of the decedent as respects personal property located outside the state.[51] And such tax has been based too upon the theory that it is for a benefit or privilege extended by the state exacting the tax. It is asserted that the *res* taxed is the privilege of transmitting property, and for that reason the state of the domicil of the decedent, which grants the privilege of transmitting the property, should have jurisdiction to tax. But is it not the state of the situs of the property that makes the privilege effective, rather than that of the domicil of the decedent, and should it not be the state to levy the tax? Suppose A dies domiciled in New York State, owning land and chattels in Ohio, and his heirs are domiciled in New Jersey, and the sovereign states of New York and New Jersey say that this property shall or shall not go to B, C, and D, but the state of Ohio says the exact contrary, that it shall not or it shall go to B,

[49] Matter of Swift, 137 N. Y. 77; 32 N. E. 1096 (1893); Callahan *v.* Woodbridge, 171 Mass. 595, 51 N. E. 176 (1898); Weaver's Estate *v.* State, 110 Iowa, 328, 81 N. W. 603 (1900); Stanton's Estate, 3 Pa. Dist. Rep. 371 (1894); Eidman *v.* Martinez, 184 U. S. 578 (1902); Allen *v.* National State Bank, 92 Md. 509, 48 Atl. 78 (1901).

[50] People *v.* Union Trust Co., 280 Ill. 170, 117 N. E. 385 (1917); McCurdy *v.* McCurdy, 197 Mass. 248, 83 N. E. 881 (1908). (Held subject to the tax when brought into the state.)

[51] *In re* Swift Estate, 137 N. Y. 77, 32 N. E. 1096 (1893); McCurdy *v.* McCurdy, 197 Mass. 248, 83 N. E. 881 (1908); State *ex rel.* Smith *v.* Probate Court of Ramsey Co., 124 Minn. 508, 145 N. W. 390 (1914).

C, and D. Is it not evident that both New York and New Jersey are helpless in the matter except in so far as Ohio submits to their wills? No one can make an effective claim to the property in Ohio except as the state of Ohio sanctions it, and a claim sanctioned by the state of Ohio will be effective no matter what New York or New Jersey may have to say about it.

Again it is said in explanation of the practice which sustains a succession tax imposed by the state of the domicil of the decedent on foreign personal property, but not on real property, that it results from the fact that the law of the owner's domicil is the one that is applied to regulate the devolution of personal property, but not that of real property.[52]

The fact that the law of a particular state is applied to determine the rights of parties ought never to be confused with the question of jurisdiction. That the law of the decedent's domicil is applied to determine devolution to personality seems to furnish no basis of jurisdiction for that state to impose a tax. There is no protection, privilege, or benefit extended or conferred by such state. In its ultimate analysis, it is the state where the property is located that controls and makes effective its devolution,[53] though for convenience that state may apply the rules of law existing in the state of the decedent's domicil in so doing. It has also been urged that by reason of the fiction *mobilia sequuntur personam*, personal property has its situs at the domicil of the owner. But this is admittedly a fiction and certainly gives no actual power of control over the property to the state of the owner's domicil. It is a fiction, too, that has been rejected in the case of a property tax upon chattels outside the state imposing the tax, on the ground that such tax constitutes the taking of property without due process of law and is therefore unconstitutional.[54] It seems difficult if not impossible to find any sufficient ground upon which to justify an inheritance tax at the decedent's domicil upon property having a foreign situs. Justice Gray's opinion in *In re Estate of Swift* [55] that "the theory of sovereignty, which invests the state with the right and the power

[52] Dammert *v.* Osborn, 141 N. Y. 564, 35 N. E. 1088 (1894); Estate of Swift, 137 N. Y. 77, 88, 32 N. E. 1096 (1893).

[53] In Illinois by statute tangible property of a decedent domiciled elsewhere goes according to the Illinois law. Cooper *v.* Beers, 143 Ill. 25, 33 N. E. 61 (1892).

[54] Union Transit Co. *v.* Kentucky, 199 U. S. 194 (1905).

[55] 137 N. Y. 77, 84, 32 N. E. 1096, 1097 (1893).

to permit and to regulate the succession to property upon its owner's decease, rests upon the fact of an actual dominion over that property," states the true ground upon which jurisdiction to impose a succession tax must rest.

While in the succession tax cases there is disagreement as to which state furnished the protection or privilege, there is complete agreement in both the property and succession tax cases on the more fundamental proposition that jurisdiction to tax rests in the state which furnished such protection or privilege. And as we have seen, that state is necessarily the one which has power of control over the property.

Let us now pass from the consideration of taxation upon tangible property to a consideration of the question of which states should tax debts.

It is submitted that, following the analogy of taxation upon tangible property and the principle that a tax is taken as an equivalent for protection, service, or benefit given by the taxing power, the state of the debtor's domicil is the one and the only one which should exact the tax on debts. Where the debts are in the form of a specialty which is held in another state and the convenient theory or fiction is adopted that an obligation represented in a mercantile specialty shall be treated as wholly merged in that specialty, then the tax should be levied only where the specialty is located.

In spite of principle and weighty authority in support of the taxing of debts at the debtor's domicil, it still seems to be generally conceded that the fiction *mobilia sequuntur personam* is properly applicable to intangible personal property in the form of debts and that they are taxable at the creditor's or owner's domicil.[56]

[56] Darnell *v.* Indiana, 226 U. S. 390 (1912); Selliger *v.* Kentucky, 213 U. S. 200 (1909); Southern Pacific Co. *v.* Kentucky, 222 U. S. 63, 69 (1911); Ayer & Lord Tie Co. *v.* Kentucky, 202 U. S. 409 (1906); Bristol *v.* Washington County, 177 U. S. 133 (1900); Bellows Falls Power Co. *v.* Com., 222 Mass. 51, 109 N. E. 891 (1915); Welch *v.* Boston, 221 Mass. 155, 109 N. E. 174 (1915); Frothingham *v.* Shaw, 175 Mass. 59, 55 N. E. 623 (1899).

A succession tax imposed by the state of the domicil of a decedent creditor is very common. State *ex rel.* Smith *v.* Probate Court of Ramsey Co., 124 Minn. 508, 145 N. W. 390 (1914); *In re* Swift Estate, 137 N. Y. 77, 32 N. E. 1096 (1893). (Held subject to tax when brought into the state.) McCurdy *v.* McCurdy, 197 Mass. 248, 83 N. E. 881 (1908); People *v.* Union Trust Co., 280 Ill. 170, 117 N. E. 385 (1917).

Some cases deny the power to tax at the creditor's domicil. Bridges *v.* Mayor & Council of Griffin, 33 Ga. 113 (1861). The court here held that a debt was not taxable

A tax at both the debtor's and creditor's domicil is considered constitutional.[57]

The tax upon debts at the domicil of the creditor has been based upon several grounds. By the fiction *mobilia sequuntur personam*, the debt has been regarded as having a situs at the creditor's domicil. But this fiction can hardly be urged as a ground or justification for the tax. It is rather a form of stating a result reached and an admission of the nonexistence of a reason. The fiction has been repudiated in the case of a property tax levied at the owner's domicil upon tangible chattels outside the state;[58] and the maxim is no less a fiction when applied to debts than when applied to tangible chattels, and gave way even when applied to debts, both in *Blackstone* v. *Miller*, where Justice Holmes pointed out, "When logic and the policy of a State conflict with a fiction due to historical tradition, the fiction must give way,"[59] and in *Liverpool Insurance Co.* v. *Orleans Assessors*,[60] where Justice Hughes said, "The legal fiction, expressed in the maxim *mobilia sequuntur personam*, yields to the fact of actual control elsewhere. And in the case of credits, though intangible, arising as did those in the present instance, the control adequate to confer jurisdiction may be found in the sovereignty of the debtor's domicil." The maxim is wholly inadequate as a principle upon which to rest the tax. This has been felt by more thoughtful lawyers and they have sought to state more substantial grounds in support of the practice of imposing the tax at the creditor's domicil. It has been said,[61] "It is difficult to see how this relation [the debt][62] can be property

at the domicil of the creditor which was the city of Griffin. The court said "that unless the persons who owe the debts reside in Griffin, they are not properly within the city."

Tax at debtor's domicil sustained; see Tappan *v.* Merchants' National Bank, 19 Wall. (U. S.) 490 (1873); *In re* Tiffany's Estate, 143 App. Div. (N. Y.) 327, 128 N. Y. Supp. 106 (1911); Armour Packing Co. *v.* Mayor of Savannah, 115 Ga. 140, 41 S. E. 237 (1902); National Fire Insurance Co. *v.* Board of Assessors, 121 La. 108, 46 So. 117 (1908).

[57] Blackstone *v.* Miller, 188 U. S. 189 (1903).

[58] Hoyt *v.* Commissioners of Taxes, 23 N. Y. 224 (1861); Union Transit Co. *v.* Kentucky, 199 U. S. 194 (1905).

[59] 188 U. S. 189, 206 (1903). See also Metropolitan Life Insurance Co. *v.* New Orleans, 205 U. S. 395 (1907), where it is said the fiction must not be allowed to obscure the truth.

[60] 221 U. S. 346, 354 (1911).

[61] Professor James Parker Hall's "Treatise on Constitutional Law," XII AMERICAN LAW AND PROCEDURE, § 176.

[62] Brackets and words included are those of the present writer.

where the debtor lives, for his obligation to pay is quite the reverse of being valuable to him, and, for similar reasons, the obligation does seem to be property where the creditor lives. This common-sense view of the matter has been accepted by the courts, and it is generally held that a debt, pure and simple, is not taxable *as property* at the residence of the debtor. On the other hand, generally speaking, debts are taxable as property at the residence of the creditor."

While this view seems plausible, it assumes that because the debt is valuable to the creditor it is taxable at the creditor's domicil. But if debts are property at the domicil of the creditor because they are valuable to him, then why are not real estate and chattels property at the owner's domicil and taxable at that place? Are they less valuable to the owner at his domicil because they have corporeality elsewhere? Yet we have seen that a tax upon foreign chattels levied at the owner's domicil is unconstitutional as taking property without due process of law, and logically is this not as applicable to a tax upon debts levied at the creditor's domicil as it is to a tax on foreign chattels?

A "third explanation of the power of taxing it [the debt] at the domicil of the creditor is that as it adds to the creditor's wealth, the power that may tax the creditor personally may exact the tax from him based on the ability which this power over the debtor gives him to pay the tax."[63] As an original proposition this explanation would perhaps be invulnerable, but our Supreme Court has taken the view that a tax upon foreign tangible property levied at the owner's domicil is unconstitutional because it is taking property without due process of law. It is only the state of the situs that protects and benefits the property, and therefore, the only one that has furnished the *quid pro quo* for the tax.[64] The situation is parallel to that of debts. Tangible property, no matter where located adds to the owner's wealth and ability to pay in the same way that a creditor's power over his debtor does. As the state of the situs of tangible property protects and makes valuable the property to an owner, so in the case of debts the state of the debtor's domicil in the same way protects and makes the debts valuable to

[63] 27 HARV. L. REV. 107, 114.

[64] Union Transit Co. *v.* Kentucky, 199 U. S. 194 (1905); Delaware, etc. Ry. Co. *v.* Pennsylvania, 198 U. S. 341 (1905); Ill. Cent. Ry. Co. *v.* Greene, 244 U. S. 555 (1917).

a creditor. So long as we base taxation on the theory that it is a *quid pro quo* for protection or benefit given, and hold a tax unconstitutional where such protection or benefit does not obtain, we must reject any theory which makes ability to pay the basis of the right to exact the tax.

There is considerable[65] and high authority in support of a tax at the debtor's domicil on the ground that power of control over the debtor furnishes the basis of jurisdiction for levying the tax. In *Blackstone* v. *Miller*,[66] the United States Supreme Court held that the state of New York could levy a succession tax upon a debt, in the form of a deposit, due an Illinois testator, from a New York debtor. In that case, Justice Holmes, who gave the opinion of the Court said,

"If the transfer of the deposit necessarily depends upon and involves the law of New York for its exercise, or, in other words, if the transfer is subject to the power of the State of New York, then New York may subject the transfer to a tax. *United States* v. *Perkins*, 163 U. S. 625, 628, 629; *McCulloch* v. *Maryland*, 4 Wheat. 316, 429. But it is plain that the transfer does depend upon the law of New York, not because of any theoretical speculation concerning the whereabouts of the debt, but because of the practical fact of its power over the person of the debtor. The principle has been recognized by this court with regard to garnishments of a domestic debtor of an absent defendant. *Chicago, Rock Island & Pacific Ry. Co.* v. *Sturm*, 174 U. S. 710. See *Wyman* v. *Halstead*, 109 U. S. 654. What gives the debt validity? Nothing but the fact that the law of the place where the debtor is will make him pay. It does not matter that the law would not need to be invoked in the particular case. Most of us do not commit crimes, yet we nevertheless are subject to the criminal law, and it affords one of the motives for

[65] Bridges *v.* Mayor and Council of Griffin, 33 Ga. 113 (1861); Armour Packing Co. *v.* Mayor of Savannah, 115 Ga. 140, 41 S. E. 237 (1902); Tappan *v.* Merchants National Bank, 19 Wall. (U. S.) 490 (1873); National Fire Insurance Co. *v.* Board of Assessors, 121 Iowa, 108, 46 So. 117 (1908); State Board *v.* Comptoir National Bank, 191 U. S. 388 (1903); People *v.* Barker, 23 App. Div. (N. Y.) 524, 48 N. Y. Supp. 553 (1897); Metropolitan Life Ins. Co. of New York *v.* New Orleans, 205 U. S. 395 (1907).

Succession tax cases: *In re* Stanton's Estate, 142 Mich. 491, 105 N. W. 1122 (1905); *In re* Rogers' Estate, 149 Mich. 305, 112 N. W. 931 (1907); Bliss *v.* Bliss, 221 Mass. 201, 109 N. E. 148 (1915); Borden *v.* Burrill, 221 Mass. 212, 109 N. E. 153 (1915); *In re* Adams' Estate, 167 Iowa, 382, 149 N. W. 531 (1914); State *ex rel.* Graff *v.* Probate Court of St. Louis County, 128 Minn. 371, 150 N. W. 1094 (1915).

[66] 188 U. S. 189, 205 (1903).

our conduct. So again, what enables any other than the very creditor in proper person to collect the debt? The law of the same place. To test it, suppose that New York should turn back the current of legislation and extend to debts the rule still applied to slander that *actio personalis moritur cum persona*, and should provide that all debts hereafter contracted in New York and payable there should be extinguished by the death of either party. Leaving constitutional consideration on one side, it is plain that the right of the foreign creditor would be gone.

"Power over the person of the debtor confers jurisdiction, we repeat. And this being so we perceive no better reason for denying the right of New York to impose a succession tax on debts owed by its citizens than upon tangible chattels found within the State at the time of the death. The maxim *mobilia sequuntur personam* has no more truth in the one case than in the other. When logic and the policy of a State conflict with a fiction due to historical tradition, the fiction must give way."

It is now well established that the state of the debtor's domicil may levy a succession tax upon debts due a nonresident decedent creditor.[67]

Power of control over the debtor is admitted to furnish the basis of taxation in other cases besides those involving the succession tax. Privilege taxes as well as other forms of taxation rest on this principle of power of control and the furnishing of a *quid pro quo* by the state imposing the tax.[68]

Where a privilege tax is imposed by the state of the debtor's domicil and is measured by the amount of the debts owed to a foreign creditor who is carrying on business within the state as

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[67] *In re* Adams' Estate, 167 Iowa, 382, 149 N. W. 531 (1914); Greves *v.* Shaw, 173 Mass. 205, 53 N. E. 372 (1899); Bliss *v.* Bliss, 221 Mass. 201, 109 N. E. 148 (1915); Borden *v.* Burrill, 221 Mass. 212, 109 N. E. 153 (1915); *In re* Stanton's Estate, 142 Mich. 491, 105 N. W. 1122 (1905); *In re* Rogers' Estate, 149 Mich. 305, 112 N. W. 931 (1907); State *ex rel.* Graff *v.* Probate Court of St. Louis County, 128 Minn. 371, 150 N. W. 1094 (1915).

[68] In Equitable Life Society *v.* Pennsylvania, 238 U. S. 143, 147 (1915), where it was held that the state of Pennsylvania could levy a tax of two per cent on gross premiums of life insurance received from business done in that state and not be taxing property beyond its jurisdiction, it was observed that though the premiums were paid directly to the insurance company outside the state, and though the state had no constitutional power to prevent the insurance company making the contracts and could not therefore be said to permit them of her own will, still the tax was upon a privilege actually used, and the state furnished the *quid pro quo* by protecting the lives insured.

is the situation in numerous cases,[69] jurisdiction to levy such tax rests upon the fact that the state has power of control over the debtor and through that means extends protection or benefit to the foreign creditor. Thus in *Liverpool Insurance Co.* v. *Orleans*,[70] a tax levied by the state of Louisiana upon amounts due a New York corporation by its policy-holders in the state for premiums upon which a credit had been extended was sustained upon the ground that control adequate to confer jurisdiction may be found in the sovereignty of the debtor's domicil because of the power over the debtor. In that case Hughes, J., who gave the opinion of the court said:

"The legal fiction, expressed in the maxim *mobilia sequuntur personam*, yields to the fact of actual control elsewhere. And in the case of credits, though intangible, arising as did those in the present instance, the control adequate to confer jurisdiction may be found in the sovereignty of the debtor's domicil. The debt, of course, is not property in the hands of the debtor; but it is an obligation of the debtor and is of value to the creditor because he may be compelled to pay; and power over the debtor at his domicil is control of the ordinary means of enforcement. *Blackstone* v. *Miller*, 188 U. S. 205, 206. Tested by the criteria afforded by the authorities we have cited, Louisiana must be deemed to have had jurisdiction to impose the tax. The credits would have had no existence save for the permission of Louisiana; they issued from the business transacted under her sanction within her borders; the sums were payable by persons domiciled within the State, and there the rights of the creditor were to be enforced. If locality, in the sense of subjection to sovereign power, could be attributed to these credits, they could be localized there. If, as property, they could be deemed to be taxable at all, they could be taxed there."

Of course it is not sought to convey the impression that a privilege tax may be sustained as a property tax levied upon debts. For example, if an insurance corporation is taxed for the privilege of doing business in a state, and the amount of the tax is determined by the amount of the debts due the corporation from residents of the state imposing the tax, an attempt to collect a tax upon

[69] Metropolitan Life Ins. Co. *v.* New Orleans, 205 U. S. 395 (1907); State Board *v.* Comptoir National Bank, 191 U. S. 388 (1903); Finch *v.* York County, 19 Neb. 50, 26 N. W. 589 (1886); People *v.* Barker, 23 App. Div. (N. Y.) 524, 48 N. Y. Supp. 553 (1897).

[70] 221 U. S. 346, 354 (1911).

debts due the corporation, after the corporation has ceased to do business in the state, is unconstitutional, for such tax would result in inequality and unfairness, as all creditors would not be taxed uniformly. To sustain a tax for the privilege of doing business in a state, business must be done in that state.[71] On the basis of a power of control analogous to that exercised over the debtor, the stock of national banks and of corporations may be taxed at the place where the bank is located or the corporation incorporated without regard to the residence of the owner.[72] The registered bonds of a state kept by a nonresident at his domicil may be taxed by the state, for the state cannot be sued on the bonds in the federal courts; it can be impleaded only in its own courts, and the bond can be transferred only by bringing it to the proper registration officer of the state and there complying with the law of the state respecting transfer of registration.[73]

It would seem that ordinary bonds on this principle of power of control over the debtor should be held taxable at the domicil of the debtor though the owner holds the bonds elsewhere, for it is that state, through its control over the debtor, that makes the obligation of the debtor of value to the creditor, but it was held by the United States Supreme Court in *State Tax on Foreign-Held Bonds*,[74] that the state of Pennsylvania could not tax an Irish bondholder on the bonds of a Pennsylvania railway secured by a mortgage on its property. The court accepted the fiction *mobilia sequuntur personam*,[75] which was later repudiated by the United States Supreme Court, when applied to tangible chattels in *Union Refrigerator Transit Co.* v. *Kentucky*.[76] The court in *State Tax on Foreign-Held Bonds* thought that such tax was unconstitutional because it was an attempt to tax the debts as property of the debtors. The court said, "Debts . . . are not property of the debtors, in any sense; they are obligations of the debtors, and

[71] Provident Savings Association *v.* Kentucky, 239 U. S. 103 (1915).

[72] Tappan *v.* Merchants' National Bank, 19 Wall. (U. S.) 490 (1873); Borden *v.* Burrill, 221 Mass. 212, 109 N. E. 153 (1915) (succession tax); Greves *v.* Shaw, 173 Mass. 205, 53 N. E. 372 (1899) (succession tax); *In re* Stanton's Estate, 142 Mich. 491, 105 N. W. 1122 (1905) (succession tax).

[73] Bliss *v.* Bliss, 221 Mass. 201, 109 N. E. 148, 150 (1915).

[74] 15 Wall. (U. S.) 300 (1872).

[75] "Debts belong to the creditors . . . and follow their domicil wherever that may be." 15 Wall. (U. S.) 300, 320 (1872).

[76] 199 U. S. 195 (1905).

only possess value in the hands of the creditors. With them they are property, and in their hands they may be taxed. To call debts property of the debtors is simply to misuse terms." It is evident that the court wholly misconceived the Pennsylvania statute; there was no attempt to tax debts as assets of the debtor. It is difficult to understand how anyone would so conceive of debts. The mere fact that the tax was levied at the debtor's domicil certainly does not justify that conclusion. The tax was a tax upon the creditor but levied at the debtor's domicil. Not only was the reasoning of the court wholly unsound, but the case has been practically overruled by the United States Supreme Court in *Savings Society* v. *Multnomah County*, and similar cases[77] and in *Blackstone* v. *Miller*.[78] In *Savings Society* v. *Multnomah County* the court held that notes given by Oregon debtors secured by mortgage upon Oregon land, though held by citizens of California, were taxable by the state of Oregon. The attempt the court made in the latter case to distinguish *State Tax on Foreign-Held Bonds*, on the ground that there the tax was upon the interest due to the bondholders and not upon their interest in the mortgage, is not warranted by the facts of the case. It was as much the interest in the mortgage that was taxed in the one case as in the other. Taxes like that sustained in *Savings Society* v. *Multnomah County* are not uncommon and have always been upheld.[79] Holmes, J., attempted to distinguish *Blackstone* v. *Miller*, where it was held that power of control over the debtor conferred jurisdiction to tax the debt against a foreign creditor at the debtor's domicil from *State Tax on Foreign-Held Bonds*, upon the ground that bonds and negotiable instruments are more than mere evidences of debt, but by a tradition from archaic times constitute the debt.

It may be desirable that courts adopt the theory that debts in the form of specialties shall be taxable at the place where the instrument is located, and if that theory is adopted consistency would require that the debts should not be taxed at the domicil of the debtor also, for the theory is that the debt is merged in the specialty. Of course, even if that view of specialties is taken it

[77] 169 U. S. 421 (1898); Bristol *v.* Washington County, 177 U. S. 133 (1900).

[78] 188 U. S. 189 (1903).

[79] Finch *v.* York Co., 19 Neb. 50, 26 N. W. 589 (1886); *In re* Rogers' Estate, 149 Mich. 305, 112 N. W. 931 (1907).

must be recognized that it is only a theory, and that the ultimate power of control which rests in the state having jurisdiction over the debtor, and which is a sufficient basis for jurisdiction over the debt, can never by any fiction or theory be taken from a state without its consent. The decisions, however, will not justify the distinction taken by Justice Holmes in *Blackstone* v. *Miller*. While it may be that *Buck* v. *Beach*,[80] which held that mortgage notes, made by a debtor in Ohio, payable in Ohio and secured by a mortgage in Ohio, the owner of which resided in New York, were not taxable in Indiana where they had been sent for safe-keeping, is reconcilable with *Wheeler* v. *New York State*,[81] which upheld a succession tax by New York upon promissory notes belonging to a nonresident where they were found in the state of New York, on the ground that in *Buck* v. *Beach* the notes held not taxable in Indiana were moved backward and forward between Ohio and Indiana with the intent to avoid taxation in either state, and were really not in Indiana hands for business purposes. Still that does not go to the length to which Justice Holmes goes in *Blackstone* v. *Miller* in order not to overrule *State Tax on Foreign-Held Bonds*, in saying the debt has been so completely merged in the specialty that an attempt to tax it at the debtor's domicil is unconstitutional. Courts never have gone, and on correct principle never can go, that far in their actual decisions toward recognizing the theory of a merger of the debt into the specialty. The situation is now ripe for a decision by the United States Supreme Court squarely overruling *State Tax on Foreign-Held Bonds*.

Finally there seems to be no reason that can be urged in support of a property or succession tax upon debts at the creditor's domicil that cannot be equally urged to support such a tax against an owner at his domicil on foreign-held real and tangible personal property. The owner's title to foreign property is for the state where he resides an intangible thing similar to his right to have payment of a debt. For purposes of jurisdiction foreign real property and tangible personalty are choses in action as much as debts are.[82]

[80] 206 U. S. 392 (1907).

[81] 233 U. S. 434 (1914).

[82] Ames in his lecture, "The Nature of Ownership," speaking of the interest of the disseisee, says: "For as we have seen, this interest, being a *chose in action*, was not transferable at common law, either by conveyance *inter vivos*, or by will, nor even, as a rule, by operation of law." AMES, LECTURES ON LEGAL HISTORY, 192.

If the property or debtor is outside the jurisdiction there seems to be no essential difference in the power of control over the property from that over the debt or in the protection afforded to the owner of the property from that afforded the owner of the debt by the sovereign of his domicil. If, therefore, a tax at the owner's domicil cannot be supported in case of foreign-owned real estate and chattels it is difficult to see how it can be supported on other than historical grounds against a creditor at his domicil on debts owed by a foreign debtor.

On the other hand, every reason which goes to support the taxation of real and tangible personal property at its situs can be urged in support of a tax upon debts against the creditor at the debtor's domicil. The real reason why tangible property is taxable at its situs is not that it occupies space there, but that the sovereign where it is located can exercise control over it there, and thus afford it the protection for which the tax is exacted. In like manner the sovereign of the debtor's domicil has control over the obligation, by having jurisdiction over the debtor and protects it, and the debtor, and makes the debt valuable to the creditor. It profits the foreign creditor as respects the debt in the same way it does the foreign owner of tangible property within its jurisdiction. And in like manner such state and such state alone should be the one to levy the tax.[83]

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[83] While from an economic standpoint debts should not be taxed as they do not represent wealth still a tax at the domicil of the debtor has several economic advantages over the present method. It will prevent duplication in taxation — a very desirable result — and the present notorious method of tax evasion practiced by concealment of the identity of the creditor in debts secured by trust deeds on real estate will be avoided and there will be no greater likelihood of concealment of debts in general under a system of taxing debts at the domicil of the debtor than at the domicil of the creditor.

So far as shifting the burden of taxation from creditor to debtor is concerned a tax collected at the creditor's domicil will be as objectionable in that respect as one collected at the debtor's domicil. The interest rate will be affected in either instance if the tax upon debts is made effective.